INDEX.

Page

Subject Index.

Brief for Petitioner in Reply to Brief for the United States in Opposition 1

Statement 1

Point I—The Intent of Congress to Create a Liability on the part of the United States by enacting Private Law 660 is clear and the Language of the Special Act is unequivocal and unambiguous 2

Point II—The Legislative History Conclusively Demonstrates that the Intent of Congress was to Assume the Liability for the Damages Sustained by Petitioner 5

Point III—The Problem Presented Herein Is Important, not alone to Petitioner but to all other Small Business Men who may find Themselves in a Similar Situation 8

Conclusion 10

Table of Cases Cited.

Braden v. United States, 16 Ct. Cls. 389 ..... 3, 4
Garrett v. United States, 70 Ct. Cls. 304 ..... 2, 5
Norfolk Southern Railroad Co. v. United States, 96 Ct. Cls. 357 3
Pope v. United States, 323 U. S. 1 ..... 5, 9, 10
United States v. St. Paul M. & M. Ry. Co., 247 U. S. 310, 318 8
Whitman v. Oxford National Bank, 176 U.S. 559, 562 4

Statutes and Other Authorities Cited.

Air Corps Act of July 2, 1926, 44 Stat. 780, 784 ..... 4, 5, 8
Private Law 660, 79th Congress, 2d Session, 60 Stat. 1227, approved June 15, 1946 ..... 2, 4
Congressional Record 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 298.

ZEPHYR AIRCRAFT CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT.

The petitioner herewith respectfully submits its reply to the "Brief for the United States in Opposition" filed in the proceeding before this Court on the application for a writ of certiorari in the above entitled matter.

The arguments in reply will be developed in the points set forth herein.

Point I.

The Intent of Congress to Create a Liability on the Part of the United States by Enacting Private Law 660 Is Clear and the Language of the Special Act Is Unequivocal and Unambiguous.

The argument of the Government, as set forth in its Brief in Opposition (pp. 9 through 12), is that the Private Act in this case conferred jurisdiction upon the Court of Claims "to hear, determine, and render judgment" on petitioner's claim, and that "in the determination of such claim, the United States shall be held liable for damages, and for any acts committed by any of its officers or employees, to the same extent as if the United States were a private person."

The argument continues that the meaning of the Act is that no liability should devolve upon the Government unless a private person would be liable in like circumstances, and that since petitioner's claim is only "a moral one, rather than legal" therefore, as it was a moral claim, the Court below was correct in dismissing the petition.

The Government is confused in its argument between a legal obligation of the Government not theretofore existing, and a legal remedy based upon a recognized cause of action.

The contention of the Government in this respect is not new. It has been tried before. In *Garrett* v. *United States*, 70 Ct. Cls., 304, the Government likewise advanced the theory that the Act in question only was intended to provide a forum for the adjudication of the plaintiff's claim and to render judgment according to established legal principles, and, since the plaintiff could not recover under established legal principles, therefore the Act created no liability on the part of the Government. The Court in overruling this position (p. 310) succinctly stated:

> "We do not agree with the position of counsel for the Government. * * * the only reasonable construction

> which can be placed on the language of the act of reference is that such liability is clearly created."

Another situation, markedly similar to the argument advanced herein by the Government, is the case of *Norfolk Southern Railroad Company* v. *United States*, 96 Ct. Cls. 357, wherein the Government again advanced the argument that the Special Act provided a forum for the plaintiff's case to be determined according to applicable legal principles. In that case the plaintiff could not recover under the applicable legal principles, but the Court found the answer in the legislative history of the bill, and they said at page 370:

> "It is clear from the above that the intention of Congress was to create a liability where heretofore there was no liability.
> "In this case to hold otherwise would render the act meaningless and absurd. • • •.
> "It is our view that the jurisdictional act gave a cause of action to the railroad company for which the Government is made liable, and which liability did not exist before the passage of the special act."

The aforesaid authorities amply demonstrate the fallacy of the argument advanced by the Government. In effect the Court below has held that the Act of Congress was meaningless. Such a holding is contrary not alone to the clear and unambiguous language of the Special Act, but also the Congressional intent as shown by the legislative history.

In *Braden* v. *United States*, 16 Ct. Cls. 389, at page 404, the Court discussed the methods used to determine Congressional intent and they pointed out that while we have no comparable legislative practice, nevertheless in Parliament all private bills are prefaced by a preamble in which the petitioner sets forth the nature of his claim, and this preamble restrains the construction of the act and aids in the interpretation of its terms.

Considering the Special Act before this Court, it will be noted that the language employed by Congress meets the suggestion of the Court in the *Braden* case, *supra*. In Section 1 of the Act, after conferring jurisdiction upon the Court of Claims, Congress employed language completely descriptive of petitioner's claim. The claim was said to be "against the United States for compensation for damage, injury, and losses suffered by the said Lenert Aircraft Corporation." Then followed the reason why Congress considered the petitioner herein had been damaged, and, in so doing, it connected the cause with the damage. The Act states: "Because of the refusal by officials of the War Department to make a contract with the said Lenert Aircraft Corporation in compliance with section 10 of the Act of July 2, 1926 (44 Stat. 784), pursuant to a design competition for the procurement of primary training planes, which was projected by circular proposal 39-635, dated March 11, 1939."

In Section 2 of the Act Congress directed the Court of Claims that in its determination of such claim "the United States shall be held liable for damages." The mandatory word "shall" was employed. The Supreme Court of the United States has held that where the word "shall" is used in a directive statute, the words are not merely directory to the legislature to make provision for a liability, but "of themselves declare it." (*Whitman* v. *Oxford National Bank*, 176 U. S. 559, 562).

In the instant case both the distinctive language and the legislative history of the Special Act, Private Law 660, clearly point to the creation of a liability and the admission of such liability where none existed prior to the passage of the Act. Congress, having made the admission of liability, immune by its very nature against direct attack, even safeguarded it from indirect attack by barring delaying and avoiding defenses.

Since Congress has the power to pay the petitioner by making an appropriation out of the Treasury, it would undoubtedly have the authority to enact a statute recognizing

such obligations, assume the liability for its payments, and vest the court with authority to hear, determine and render judgment for the amount of such damages. The petitioner in either event would receive his money by virtue of an Act of Congress. Congress is in effect the defendant herein, and as such defendant it has consented to a judgment against it in an amount to be determined by the Court. (*Garrett* v. *U. S., supra; Pope* v. *U. S.,* 323 U. S. 1).

Point II.

The Legislative History Conclusively Demonstrates That the Intent of Congress Was to Assume the Liability for the Damages Sustained by Petitioner.

The legislative history, as we have said in our petition, is presently before this Court as part of the record (petition p. 10). However, the Government's argument has gone into this phase at some length, so we deem it advantageous to briefly refer to certain salient facts. The Government's brief (p. 15) gives a mistaken impression that the bill originally introduced in the House of Representatives (H.R. 3094, in the 79th Congress) was radically changed by the Senate. Such is not the case. The bill as introduced in the House, and passed by it, provided as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims of the United States be, and hereby is, given jurisdiction to hear, determine, and render judgment on the claim of the Zephyr Aircraft Corporation against the United States because of damage, injury, and losses suffered by the Lenert Aircraft Corporation by the refusal of officials of the War Department of the United States to make a contract with the Lenert Aircraft Corporation, which is now known as the Zephyr Aircraft Corporation, after a design competition for the procurement of primary training planes, which was projected by circular proposal 39 635 dated March 11, 1939, and in which competition the Lenert Aircraft Corporation submitted designs. Said refusal being in violation of the provisions of paragraph (t), section 10, of Act of July 2, 1926 (44

Stat. 784), based upon procedure set forth in paragraphs (a) to (i) of said circular proposal 39 635 in that, the Lenert Aircraft Corporation, now the Zephyr Aircraft Corporation, was the only bidder that offered a new and modern design in accordance with the provisions of said Act.

"That the officials of the War Department illegally, arbitrarily, and without any reason or authority, refused and failed to make a survey or evaluate the design submitted by the Lenert Aircraft Corporation, now the Zephyr Aircraft Corporation, either before or after the submission of competitive design; and illegally and without authority entered into a contract for the purchase of airplanes that had been in production for a number of years, instead of a new and modern design.

"Sec. 2. The judgment under this Act will cover all losses, damages, and injuries to the Lenert Aircraft Corporation, including prospective profits.

"Sec. 3. Suit upon this claim may be instituted at any time within one year after the passage of this Act, notwithstanding the lapse of time, laches, the form and content of protest, and supporting papers thereof. Proceedings upon the determination of such claim and appeals from the payment of the judgment thereon, shall be in the same manner as in the case of claims over which the court has jurisdiction under section 145 of the Judicial Code as amended."

The bill as finally enacted with the Senate amendment, deleted certain language from the House bill and in Section 2 thereof clarified the position of Congress by the mandatory provision that the United States "shall be held liable for damages." A comparison of the essential elements of the bill and its amendment is set forth herein as follows:

The Bill of the House
The Enacting Clause

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

The Jurisdictional Clause

That the Court of Claims of the United States be and hereby is given jurisdiction to *hear, determine and render judgment* on the claim of Zephyr Aircraft Corporation *against the United States.*

The Liability Clause

because of damages, injury and losses suffered by the Lenert Aircraft Corporation by *refusal* of officials of the War Department of the United States to make a contract with the Lenert Aircraft Corporation which is now known as Zephyr Aircraft Corporation.

Sec. 2—The judgment under this Act will cover all losses, damages and injuries to the Lenert Aircraft Corporation including prospective profits.

The Bill Amended by Senate
The Enacting Clause

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

The Jurisdictional Clause

That jurisdiction is hereby conferred upon the Court of Claims of the United States to *hear, determine and render judgment* on the claim of the Zephyr Aircraft Corporation * * * *against the United States.*

The Liability Clause

for compensation for damage, injury and losses suffered by the said Lenert Aircraft Corporation because of the *refusal* by officials of the War Department to make a contract with the said Lenert Aircraft Corporation.

Sec. 2—In the determination of such claim the United States *shall be held liable for damages* and for any acts committed by any of its officers or employees to the same extent as if the United States were a private person.

(Emphasis supplied)

Section 3 in both bills was similar.

In arriving at Congressional intent the Supreme Court has said that the bill *as introduced* may be resorted to. (*United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 318). Since it is proper to consider the bill as introduced, we submit that there can be no question but that the intent of Congress was to declare the liability of the United States to the petitioner. Had that intent been changed by the Senate in its amendment, the Chairman of the Claims Committee of the House of Representatives would have demanded a conference with the Senate to consider the amendment. (Congressional Record, Vol. 92, p. 6134).

The legislative history shows conclusively that the bill itself was a directive to the Court of Claims to assess the amount of damages, and in this case the Court failed to heed the Congressional mandate.

Point III.

The Problem Presented Herein Is Important, Not Alone to Petitioner But to All Other Small Business Men Who May Find Themselves in a Similar Situation.

The Government has advanced the contention that the case is of no importance. Congress thought otherwise for it considered the bill in three sessions, passed it in two, the second time passing it despite a presidential veto of the prior bill. Congress likewise considered the matter of petitioner of sufficient importance to warrant a complete investigation of the facts by "The Truman Committee", the House Military Affairs Committee, and the Committee on Claims in both the House and the Senate.

The importance of the issues herein may well be said to rest, not alone in the legislative history of this particular act, but also in the legislative history of the Air Corps Act of 1926. The Air Corps Act of 1926, specifically provides that it was to encourage the development of aviation and to improve the efficiency of the Armed Services. The Act itself, had for its purpose, not alone to secure the most

highly developed types of aircraft, but also to encourage the inventive genius of the United States and to insure that proper recognition would be given to their efforts. It was also its purpose to eliminate favoritism, fraud and collusion by requiring procurement to be based upon design competitions. While Congress assumed that the officials charged with the administration of the law would be honest, nevertheless they realized that the possibility existed wherein there might be deviations from the paths of righteousness. (Congressional Record, Vol. 67, Part II, pp. 12260, 12270).

The very purpose of the Act was to encourage the inventive genius and to see that their rights to the fruits of their genius were protected. If, as in this case, the Court can thwart the intent of Congress by completely ignoring its legislative enactment, then the rights of small business men cannot receive the protection which Congress intended to afford them. It is of paramount importance that the honor and integrity of the United States in its dealings with its citizens should be preserved. Citizens dealing with their Government should be able to rely upon its representations, and if the rights of the citizens are invaded by the acts of prejudiced officialdom, for which the law gives no remedy, then the citizens have every right to rely upon the acts of Congress to redress such wrongs. This point was most forcibly brought home by this Court in *Pope* v. *United States, supra.* There the plaintiff had exhausted his legal remedies and this court had denied certiorari conclusively establishing that the plaintiff was not entitled to recover, nevertheless Congress created a new obligation of the Government to pay the plaintiff's claims when no obligation existed before. The Court of Claims failed in the *Pope* case, as in the case at bar, to heed the Congressional directive and dismissed the petition. This Court, in reversing the Court of Claims, held that the power of Congress to provide for the payment of debts conferred by Section 8 of Article 1 of the Constitution was not restricted to the pay-

ment of obligations legally binding on the Government, but extended to the creation of obligations in recognition of claims, which are merely moral or honorary. In deciding the case this Court succinctly stated, page 11, that "Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data." As in the *Pope* case, so in the case at bar, the direction was to the Court of Claims to determine the compensation to be given to the petitioner for "damage, injury, and losses" because the officials of the War Department refused to make a contract with the petitioner pursuant to the design competition.

We respectfully submit that the case at bar is of the greatest importance if the citizens of this country, the small business men, the inventive genius, are to be protected and their faith in their Government preserved.

CONCLUSION.

The case involves serious questions of importance, is in direct conflict with other decisions, and the Court below has committed a serious error in its decision.

It is respectfully urged that the petition for a writ of certiorari should be granted.

LORING M. BLACK,
Attorney for Petitioner.

WILLIAM E. BUCKLEY,
KERMIT F. KIP,
Of Counsel.